

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KELLY LILLY)	
Claimant)	
)	
VS.)	Docket No. 1,030,114
)	
INTERSTATE BRANDS CORPORATION)	
Self-Insured Respondent)	

ORDER

Respondent requests review of the September 15, 2006 Order for Medical Treatment (Order) entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment and temporary partial disability benefits (TPD) after concluding that claimant established that she injured her wrist in an accident that arose out of and in the course of employment with the respondent and that she provided timely notice of her accidental injury.

Respondent requests review of the ALJ's decision alleging that claimant's credibility and that of her only witness were so compromised, that it was error for the ALJ to conclude that claimant actually sustained any accident as a result of her work activities or that she timely notified respondent of any such alleged injury. Accordingly, respondent maintains the ALJ's Order should be reversed. Alternatively, respondent maintains the ALJ exceeded his jurisdiction in awarding claimant TPD as this is, at best, a scheduled injury to claimant's wrist and therefore she is not entitled to TPD benefits at a preliminary hearing.

Claimant argues the order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member finds the ALJ's Order should be affirmed.

The facts and circumstances surrounding this claim are hotly contested, as evidenced by the lengthy preliminary hearing transcript.¹ The parties are well versed in the facts and they will not be repeated herein. Claimant alleges she sustained a crush injury while working at her normal job duties. When and whether this accident happened and precisely who she told of the accident is at the heart of the parties' dispute.

Respondent argues that both claimant's testimony and that of her co-worker and friend, Sharon Hewitt, on the issues of accidental injury and notice are inherently unreliable. Respondent further argues that the medical records do not comport with claimant's version of the events. And Rita Harrier, claimant's supervisor and the individual claimant purports to have given notice to, denies an accident or notice of any such event between March and June 2006. It was only in June 2006 when claimant filled out an accident report and requested medical treatment that Ms. Harrier knew that claimant was alleging a work-related injury. And the document filed with the Division of Workers Compensation reflects an injury to the "left wrist, left arm, body and all parts injured or affected by injury including any and all systems and any and all aggravations of preexisting conditions."²

After hearing all the testimony, the ALJ granted claimant's request for medical treatment and TPD benefits. He concluded that "[c]laimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and in the course of employment. Notice was given within 10 days."³ The Order goes on to explain the ALJ's reasoning:

Claimant is a poor historian. However, a fellow employee, Sharon Hewett [sic], witnessed claimant providing notice of an accidental injury. Ms. Hewett [sic] also witnessed claimant wearing a splint on her left wrist shortly after seeing claimant giving notice. Dr. Saylor's notes indicate he first saw claimant on 3/18/06. All three witnesses worked on March 17, 2006, which the court finds the most likely date of accident.⁴

Not every preliminary hearing Order is appealable to the Board. K.S.A. 44-534a and K.S.A. 44-551 restrict a party's right to appeal from a preliminary hearing to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the benefits allowed or when certain threshold issues are the subject of the preliminary decision. Those threshold issues include "whether an employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's

¹ The transcript spans 128 pages.

² E-1 filed with the Division on July 27, 2006.

³ ALJ Order (Sept. 9, 2006).

⁴ *Id.*

employment, whether notice is given or claim timely made, or whether certain defenses apply.⁵

After reviewing the record, this Board Member agrees with the ALJ's observation that claimant is, at best, a poor historian. The date of her accident has changed several times during the course of this litigation. And while the date of accident is normally important, in this claim it is particularly crucial because claimant contends that Sharon Hewitt witnessed her giving notice to her supervisor, Rita Harrier, immediately after the accident. And these three individuals did not routinely work together. So, in order for claimant's version of the events to ring true, both as to the existence of an accident while she was working and notice, there are a limited number of days on which these events could have happened. And the medical records do not necessarily lend a great deal of support to claimant's claim as she did not seek treatment immediately. Although Dr. Saylor signed an off work slip for March 18-20, 2006, that same note indicates claimant was "ill" and that she was *not* seen in the office on those dates. Claimant did not actually receive treatment for what she describes as a crush injury to her wrist until March 27, 2006.

The ALJ concluded that March 17, 2006, a day that all three of the women were present in the store, was the "most likely date of accident". In making this finding, he undoubtedly took into consideration the credibility of both the claimant and Ms. Hewitt. The Board has, in the past, found that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant, Ms. Hewitt and respondent's representatives testify in person. In granting claimant's request for benefits the ALJ apparently believed claimant's version of the events over the respondent's evidence.

The Board has concluded that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, based upon the evidence developed so far in this record, this Board Member finds that the ALJ's Order as to the compensability of claimant's alleged accident should be affirmed.

Moreover, this member does not believe that the ALJ exceeded his jurisdiction in granting TPD. K.S.A. 44-510d(b) specifically excludes additional compensation for scheduled injuries beyond that afforded by K.S.A. 44-510d(a). But at this juncture in the proceedings, it is unclear if claimant's injury is solely a scheduled injury or an injury to her opposing wrist and/or the whole body. Accordingly, the ALJ did not exceed his jurisdiction in awarding TPD benefits.

⁵ K.S.A. 44-534a.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁶ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 15, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
M. Joan Klosterman, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge

⁶ K.S.A. 44-534a.